SUPREME COURT OF INDIA

Purushottam s/o Tulsiram Badwaik

Vs.

Anil

C.A.No.4664 of 2018

(Arun Mishra and Uday Umesh Lalit,JJ.,)

02.05.2018

JUDGMENT

Uday Umesh Lalit,J.,,

SLP (Civil) No.14589 of 2016

1. Leave granted.

2. Rejection of application preferred by the appellant under Section 8 of the Arbitration and Conciliation Act, 1996 ("1996 Act" for short) as affirmed by the High Court of Bombay at Nagpur by its judgment and order dated 10.12.2015 in Civil Revision Application No.88 of 2015, is under challenge in this appeal.

3. The appellant and the respondents had entered into a Partnership Agreement dated 09.11.2005. Clause 15 of said Partnership Agreement was as under:

> "15) That in case of any dispute between the partners as regards interpretation of this Deed or any other matter connected with the partnership business, the same shall be referred to for arbitration in accordance with the provisions of Indian Arbitration Act, 1940, and the decision of the Arbitrator shall be final and binding on all the partners."

4. The appellant had also executed a registered Power of Attorney on 28.12.2006 in favour of the partners. In April 2014 the respondents filed Special Civil Suit No.16 of 2014 in the Court of Civil Judge, Senior Division, Bhandara for declaration, damages, accounts and permanent injunction against the appellant. Soon after receipt of the notice, the appellant preferred an application under Section 8 of 1996 Act to refer the dispute to arbitration in view of aforesaid clause 15 in the Partnership Agreement. The matter was contested. The Trial Court rejected said application by its order dated 05.01.2015. It was held that aforesaid clause 15 was vague, that there was no reference as to who should be the arbitrator, that there was no mention about selection of the arbitrator and that the dispute did not form subject matter of agreement within the meaning of Section 8 of 1996 Act.

5. The matter was carried further by the appellant by filing Civil Revision Application No.88 of 2015 in the High Court. The High Court took the view that the relevant clause indicated agreement between the parties to refer the disputes to arbitration as per provisions of the Indian Arbitration Act, 1940, (1940 Act, for short) although the Partnership Agreement was entered into much after the enactment of 1996 Act. Relying on portion of para 35 of the decision of this Court in *Thyssen Stahlunion GMBH v. Steel Authority of India Ltd*[1]. and on the decision of a learned Single Judge of the Patna High Court in *Rajan Kumar Verma and anr. v. Sachchidanand Singh*[2], the High Court observed in paragraphs 6 and 7 as under :-
"The Supreme Court in Thyssen Stahlunion GMBH (supra) has observed in paragraph 35 of its judgment as under:

> "35. Parties can agree to the applicability of the new Act even before the new Act comes into force and when the old Act is still holding the field. There is nothing in the language of Section 85(2)(a) which bars the parties from so agreeing. There is, however, a bar that they cannot agree to the applicability of the old Act after the new Act has come into force when arbitral proceedings under the old Act have not commenced though the arbitral agreement was under the old Act."

From aforesaid observations of the Supreme Court, it can be seen that if the arbitration proceedings had not been commenced under the Act of 1940 till the Act of 1996 came into force, same could not be commenced thereafter. It has further been observed that there is a bar to agree to the applicability of the Act of 1940 after the Act of 1996 has come into force. Similar view taken in Rajan Kumar Verma (supra) by learned Single Judge of the Patna High Court stands upheld in view of rejection of the challenge thereto before the Supreme Court."
The High Court thus rejected the challenge and dismissed said Civil Revision by its judgment under appeal.

6. In support of this appeal, Mr. Chirag M. Shroff, learned Advocate submitted:-

> (a) The reference to the 1940 Act in the partnership deed dated 09.11.2005 has to be necessarily referred to Arbitration process, as prevalent on the date of signing of the Agreement.
>
> (b) The mention of 1940 Act will not defeat the intention of the parties to go for arbitration as a dispute resolution mechanism.

7. On the other hand, Mr. Amol Nirmalkumar Suryawanshi, learned Advocate appearing for the respondent submitted that the question as to whether 1996 Act or 1940 Act would govern the relationship between the parties was so fundamental that mistakes in that behalf would invalidate the entire arbitration clause and as such the courts below were justified in rejecting the submissions advanced by the appellant.

8. In the present case though the Partnership Agreement was entered into after 1996 Act had come into force, the relevant clause made reference to "arbitration in accordance with the provisions of Indian Arbitration Act, 1940". It is not the case of the respondent that the

agreement between the parties suffered from any infirmity on account of fraud, coercion, undue influence or misrepresentation. What is however projected is that the reference to arbitration in terms of 1940 Act was such a fundamental mistake that it would invalidate the entire arbitration clause and as such there could not be any reference to arbitration at all.

9. The term "Arbitration Agreement" has been defined in Section 7 of 1996 Act as under :-

> "7. Arbitration agreement. - (1) In this Part, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.
>
> (2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.
>
> (3) An arbitration agreement shall be in writing.
>
> (4) An arbitration agreement is in writing if it is contained in -
>
> (a) a document signed by the parties;
>
> (b) an exchange of letters, telex telegrams or other means of telecommunication (including communication through electronic means) which provide a record of the agreement; or
>
> (c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.
>
> (5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make the arbitration clause part of the contract."

10. Thus the basic requirements for an "arbitration agreement" are - (a) an agreement between the parties to submit to arbitration all or certain disputes which have arisen or which may arise in future in respect of a defined legal relationship; (b) such an arbitration agreement shall be in writing. The second requirement can be discernible from the documents or exchange of communication as well. These requirements as stipulated in Section 7 are certainly satisfied in the present matter. The question however remains is whether reference to 1940 Act in the agreement would have any bearing. At this stage, we may consider the provisions of Section 85 of 1996 Act which Section is to the following effect:

> "85. Repeal and savings - (1) The Arbitration (Protocol and Convention) Act, 1937 (6 of 1937), the Arbitration Act, 1940 (10 of 1940) and the Foreign Awards (Recognition and Enforcement) Act, 1961 (45 of 1961) are hereby repealed.

(2) Notwithstanding such repeal, - (a) the provisions of the said enactments shall apply in relation to arbitral proceedings which commenced before this Act came into force unless otherwise agreed by the parties but this Act shall apply in relation to arbitral proceedings which commenced on or after this Act comes into force;

(b) all rules made and notifications published, under the said enactments shall, to the extend to which they are not repugnant to this Act, be deemed respectively to have been made or issued under this Act."

11. Sub-section (1) of Section 85 repealed three enactments including 1940 Act. Sub-section (2) stipulates inter alia that notwithstanding such repeal, the repealed enactment namely 1940 Act would continue to apply in relation to arbitral proceedings which had commenced before 1996 Act came into force unless the parties were to agree otherwise. The second limb of first clause of said sub-section (2) further stipulates that notwithstanding such repeal the provisions of 1996 Act would apply in relation to arbitral proceedings which commenced on or after 1996 Act came into force.

12. In *M.M.T.C. Limited v. Sterlite Industries (India) Ltd*[3]. , the arbitration agreement was of a date prior to the commencement of 1996 Act. The commencement of arbitral proceedings was however after 1996 Act had come into force and as such it was held by this Court in paragraph 11 that the provisions of 1996 Act would apply. Further, the arbitration clause contemplated appointment of two arbitrators and a question also arose whether the appointment of arbitrators had to be in tune with the clause in question or in terms of the provisions of 1996 Act. Paragraph Nos.1, 4, 5, 8, 10, 11, 12, and 13 of said decision are quoted hereunder for ready reference:

"1. The point involved for decision is, the effect of the Arbitration and Conciliation Act, 1996 (for short "New Act") in the present case on the arbitration agreement made prior to the commencement of the New Act. Clause VII of the agreement dated 14-12-1993 between the parties is, as under:

"VII. In the event of any question or dispute arising under or out of or relating to the construction, meaning and operation or effect of this agreement or breach thereof, the matter in dispute shall be referred to arbitrator. Both the parties shall nominate one arbitrator each and the arbitrators shall appoint an umpire before proceeding with the reference. The decision of arbitrators or in the event of their not agreeing the decision of the umpire will be final and binding on the parties. The provisions of the Indian Arbitration Act and Rules made thereunder shall apply for proceedings. The arbitrators or the umpire, as the case may be, shall be entitled with the consent of the parties to enlarge the time, from time to time, for making the award. The arbitrators/umpire shall give a reasoned award. The venue of the arbitration shall be Bombay."

(emphasis supplied)

4. The contention of the learned Attorney General on behalf of the appellant is that an arbitration agreement providing for the appointment of an even number of arbitrators is not a valid agreement because of Section 10(1) of the New Act; and, therefore, the only remedy in such a case is by a suit and not by arbitration. For this reason, he urged, that sub-section (2) of Section 10 is not attracted since there is no failure to determine the number of arbitrators according to sub-section (1). Another argument of the learned Attorney General was that Section 10 is a departure from para 2 of the First Schedule of the Arbitration Act, 1940 (for short the 1940 Act), which reads as under:

"2. If the reference is to an even number of arbitrators the arbitrators shall appoint an umpire not later than one month from the latest date of their respective appointments."

5. In reply Shri Dave, learned counsel for the respondent, contended that there is no such inconsistency between Section 10 of the New Act and the corresponding provision in the 1940 Act, both being substantially the same. The learned counsel contended that the provisions of the New Act must be construed to promote the object of implementing the scheme of alternative dispute resolution; and the New Act must be construed to enable the enforcement of the earlier arbitration agreements. It was urged that each of the parties having nominated its arbitrator, thethird arbitrator was required to Be appointed according to Section 11(3) and the failure to do so attracts the consequential results under the New Act. The learned counsel contended that the provision for the number of arbitrators is a machinery provision and does not affect the validity of the arbitration agreement which is to be determined according to Section 7 of the New Act.

8. Sub-section (3) of Section 7 requires an arbitration agreement to be in writing and sub-section (4) describes the kind of that writing. There is nothing in Section 7 to indicate the requirement of the number of arbitrators as a part of the arbitration agreement. Thus the validity of an arbitration agreement does not depend on the number of arbitrators specified therein. The number of arbitrators is dealt with separately in Section 10 which is a part of machinery provision for the working of the arbitration agreement. It is, therefore, clear that an arbitration agreement specifying an even number of arbitrators cannot be a ground to render the arbitration agreement invalid under the New Act as contended by the learned Attorney General.

10. The arbitration clause provides that each party shall nominate one arbitrator and the two arbitrators shall then appoint an umpire before proceeding with the reference. The arbitration agreement is valid as it satisfies the requirement of Section 7 of the New Act. Section 11(3) requires the two arbitrators to appoint the third arbitrator or the umpire. There can be no doubt that the arbitration agreement in the present case accords with the implied condition contained in para 2 of the First Schedule to the Arbitration Act, 1940 requiring the two arbitrators, one each appointed by the two

sides, to appoint an umpire not later than one month from the latest date of their respective appointments.

11. The question is whether there is anything in the New Act to make such an agreement unenforceable? We do not find any such indication in the New Act. There is no dispute that the arbitral proceeding in the present case commenced after the New Act came into force and, therefore, the New Act applies. In view of the term in the arbitration agreement that the two arbitrators would appoint the umpire or the third arbitrator before proceeding with the reference, the requirement of sub-section (1) of Section 10 is satisfied and sub¬section (2) thereof has no application. As earlier stated the agreement satisfies the requirement of Section 7 of the Act and, therefore, is a valid arbitration agreement. The appointment of arbitrators must, therefore, be governed by Section 11 of the New Act.

12. In view of the fact that each of the two parties have appointed their own arbitrators, namely, Justice M.N. Chandurkar (Retd.), and Justice S.P. Sapra (Retd.), Section 11(3) was attracted and the two appointed arbitrators were required to appoint a third arbitrator to act as the presiding arbitrator, failing which the Chief Justice of the High Court or any person or institution designated by him would be required to appoint the third arbitrator as required by Section 11(4) (b) of the New Act. Since the procedure prescribed in Section 11(3) has not been followed the further consequences provided in Section 11 must follow.

13. Accordingly, we direct that the Chief Justice of the High Court is to appoint the third arbitrator under Section 11(4)(b) of the New Act in view of the failure of the two appointed arbitrators to appoint the third arbitrator within thirty days from the date of their appointments. Direction given by the Chief Justice of the High Court is substituted to this effect."

13. The arbitration clause in MMTC Ltd. (supra) contemplated an appointment process which was not strictly in tune with the provisions of 1996 Act and the agreement was:- "the provisions of the Indian Arbitration Act and Rules made thereunder shall apply for proceedings". The reference was thus to the provisions of 1940 Act. The reading of the decision shows that what was found crucial was date of commencement of the arbitral proceedings and if such commencement was after 1996 Act had come into force, the provisions that would govern the situation were held to be that of 1996 Act. The appointment process was also directed to be in tune with 1996 Act. What was found to be fundamental was whether there was an arbitration agreement in writing in terms of Section 7 of 1996 Act. The acceptance of submission in paragraph 5 would further show that 1996 Act must be so construed to enable the enforcement of the earlier arbitration agreement. Logically, even if in a given case, reference to arbitration in the agreement entered into before 1996 Act came into force was in terms of 1940 Act and if the arbitral proceedings had not commenced before 1996 Act came into force, the provisions of 1996 Act alone would govern the situation. The reference to "Indian Arbitration Act" or to "arbitration under 1940 Act" in such cases would be of no consequence and the matter would still be governed under 1996 Act. Would it then

make any difference if in an agreement entered into after 1996 Act, the reference made by the parties in the agreement was to arbitration in terms of 1940 Act.

14. In Thyssen (supra) three appeals were considered together. In the first of those three appeals, the arbitral proceedings had commenced on 14.09.1995 under 1940 Act and the award was given by the sole arbitrator on 24.09.1997. A petition was filed under Sections 14 and 17 of 1940 Act on 13.10.1997 for making the award rule of the Court. In these proceedings an application was moved submitting that 1996 Act having come into force on 25.01.1996, it would be applicable in respect of enforcement of the award. In the context of these facts, the question which arose for consideration was whether the award would be governed by 1996 Act for its enforcement or whether provisions of the 1940 Act would apply. In the second matter, the arbitral proceedings were held in the United Kingdom prior to the enforcement of 1996 Act and the award was made on 25.02.1996 in London and the question which arose was whether the award was governed by the provisions of 1996 Act for its enforcement or by the Foreign Awards Act. In the third matter the reference to the sole arbitrator was on 04.12.1993 and the award was given by the arbitrator on 23.02.1996 i.e. after 1996 Act had come into force. The question that was framed in the third matter was, when Clause (a) of Section 85(2) of 1996 Act used the expression "unless otherwise agreed by the parties" could the parties agree for the applicability of 1996 Act even before 1996 Act had come into force. Thus the fact situation in all three matters was clear that the commencement of arbitral proceedings was much before 1996 Act came into force. Therefore, on the strength of Section 85(2)(a) of 1996 Act, it was held that the provisions of the repealed enactments including 1940 Act would continue to apply in relation to such arbitral proceedings. The conclusions are clear from paragraphs 29 and 42 of said decision.

15. However, the High Court has placed reliance on certain observations in paragraph 35 of Thyssen (supra). In our view the observations have been quoted and relied upon by the High Court completely out of context. What this Court considered in paragraph 35 was a possibility that in terms of Section 85(2)(a) of 1996 Act even when the proceedings had commenced under 1940 Act, the parties could still agree on the applicability of the 1996 Act. What this Court thereafter stated was the position in law that if the arbitral proceedings had not commenced before 1996 Act came into force, the parties could not by their agreement agree on the applicability of 1940 Act. The idea was to emphasize that if the arbitral proceedings had not commenced as on the day when 1996 Act came into force, any subsequent commencement of arbitral proceedings had to be in terms of 1996 Act. These observations do not in any way suggest that, "if the arbitral proceedings had not commenced under the Act of 1940 till the Act of 1996 came into force, the same could not be commenced thereafter". All that these observations indicate is that in such cases there cannot be applicability of 1940 Act and not, and we repeat, that there can be no arbitration at all.

16. The correct approach, according to us, would be in promoting the object of implementing the scheme of alternative dispute resolution as was rightly submitted in MMTC Ltd. (Supra). It would be farfetched to come to the conclusion that there could be no arbitration at all. As is clear from MMTC Ltd. (Supra) what is material for the purposes of the applicability of 1996 Act is the agreement between the parties to refer the disputes to arbitration. If there be

such an arbitration agreement which satisfies the requirements of Section 7 of 1996 Act, and if no arbitral proceeding had commenced before 1996 Act came into force, the matter would be completely governed by the provisions of 1996 Act. Any reference to 1940 Act in the arbitration agreement would be of no consequence and the matter would be referred to arbitration only in terms of 1996 Act consistent with the basic intent of the parties as discernible from the arbitration agreement to refer the disputes to arbitration.

17. Viewed thus, the High Court was not right in observing that there could be no arbitration at all in the present case. In situations where the relevant clause made reference to the applicability of "the provisions of the Indian Arbitration Act and Rules made thereunder" as was the case in MMTC Ltd. (Supra), on the strength of Section 85(2)(a) the governing provisions in respect of arbitral proceedings which had not commenced before 1996 had came into force would be those of 1996 Act alone. On the same reasoning even if an arbitration agreement entered into after 1996 Act had come into force were to make a reference to the applicable provisions of those under Indian Arbitration Act or 1940 Act, such stipulation would be of no consequence and the matter must be governed under provisions of 1996 Act. An incorrect reference or recital regarding applicability of 1940 Act would not render the entire arbitration agreement invalid. Such stipulation will have to be read in the light of Section 85 of 1996 Act and in our view, principles governing such relationship have to be under and in tune with 1996 Act. As observed earlier, the requirements of "arbitration agreement" as stipulated in Section 7 of 1996 Act stand completely satisfied in the present matter nor has there been any suggestion that the agreement stood vitiated on account of any circumstances in the realm of undue influence, fraud, coercion or misrepresentation. In the circumstances, the attempt must be to sub-serve the intent of the parties to resolve the disputes by alternative disputes resolution mechanism. The High Court was, therefore, completely in error.

18. We must also hold that the view taken by the learned Single Judge of the Patna High Court in Rajan Kumar Verma (Supra) is required to be seen in the light of the present decision. Said judgment of the learned Single Judge had not noted the decision of this Court in MMTC Ltd. (Supra). Summary dismissal of SLP(C) No.25036 of 2005 vide order dated 14.12.2005 by this Court would not mean affirmation of the view taken by the learned Single Judge insofar as declaration of law is concerned .

19. We therefore set aside the judgment and order passed by the High Court and accept the appeal preferred by the appellant. The matter will have to be dealt with by the trial court in terms of Section 8 of 1996 Act. The parties shall appear before the trial court on 14th May, 2018 for effectuating the arbitration agreement.

20. The appeal stands allowed in aforesaid terms. No costs.

Judgment Referred.

[1]*(1999) 9 SCC 0334*
[2]*(1996) 6 SCC 0716*